No. 06-1205

# In The Supreme Court of the United States

**MITCHELL SCRUGGS, EDDIE SCRUGGS, SCRUGGS FARM & SUPPLIES, LLC, SCRUGGS FARM JOINT VENTURE, HES FARMS, INC., MES FARMS, INC., and MHS FARMS, INC.,**

*Petitioners,*

v.

**MONSANTO COMPANY,**

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF OF THE OFFICE OF THE ATTORNEY GENERAL FOR MISSISSIPPI AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF AMICUS CURIAE STATE OF MISSISSIPPI

The State of Mississippi, by and through its Attorney General, has an interest in the issues presented because of the State's duty to protect the general welfare of its citizens and the State's economy. Furthermore, the Attorney General has a unique role and responsibility for assuring that the State's agricultural communities enjoy the benefits and protections of the law of fair competition.

Mississippi farmers have always been the backbone of the State's economy, and that continues today. Mississippi agriculture, a $5.8 billion industry, is the State's number one industry. USDA Agricultural Statistics and Mississippi State Extension Service, http://www.mdac.state.ms.us/n_library/misc/ag_overview.html. (Last visited April 2, 2007). It employs approximately 30% of the State's workforce, either directly or indirectly, and covers approximately 11 million acres. Agriculture plays a significant role in all 82 counties. *Id.* Cotton ranks third among agricultural commodities in Mississippi - $697 million. 1.18 million acres were harvested in 2005, producing 2.16 million bales of cotton. *Id.* Soybeans rank fourth among agricultural commodities in Mississippi - $315 million. 1.57 million acres were harvested in 2005, producing 36 bushels per acre. *Id.*

The record in this case provides overwhelming documented evidence that Monsanto's monopoly power and control of seed distribution markets in Mississippi and elsewhere adversely affects farmers and the farm economy. Through its abundant market power, Monsanto has greatly exacerbated the cost-price squeeze in which the typical cotton and soybean farmer has long been trapped. Monsanto has misused its patents and its market power to eliminate the competitive forces that traditionally constrain pricing in a market economy. Monsanto has effectively cartelized cotton and soybean

seed markets, has thwarted farmer consumer choice in genetically modified seed products, has destroyed the price constraining effect of the farmer saved seed, and has overreached the legitimate scope of its patents.

The public interest cries out that Monsanto's market power and its business practices that emanate therefrom should be fairly and openly scrutinized in the context of the antitrust laws. It is in the paramount public interest of the people of Mississippi that this be done and done now. It is within the constitutional prerogatives and duties of the Attorney General of Mississippi that he advance the State's interest in this regard by urging the Court to grant the pending Petition For A Writ Of Certiorari.

## SUMMARY OF THE ARGUMENT

### I. Monsanto's Monopoly Power

The State of Mississippi is particularly concerned with Question 4:

> Whether, as the Federal Circuit held, Monsanto may misuse its patents by enforcing license restrictions upon its 300 plus trait licensee Seed Partners to cartelize seed markets and control "channels of trade" in unpatented seed products, thereby excluding the competition of other trait products.

Question 4 goes to the heart of Monsanto's market power. That power goes far beyond any lawful patent monopoly. Monsanto's market power is even beyond that required by 35 U.S.C.A. § 271(d)(5). Without Monsanto's misuse of that power, enhanced by natural and Monsanto-made barriers to entry, there would be the opportunity for effective competition, whether from other biotech trait firms, such as DuPont, Bayer, and Dow, and/or from the traditional secondary market in farmer saved seed.

The U. S. Court of Appeals for the Federal Circuit has left no doubt that it will not allow a full fledged examination of Monsanto's market power. This Court

has never considered the extent to which antitrust laws and patent misuse laws are written to constrain biotechnology patent holders claiming the protections under *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001). Until that review takes place, patent holders, like Monsanto, will circumvent these laws.

This case presents a special instance of the principle that many market practices, entirely permissible for the most part, become illegal and actionable when done by a monopolist. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Patent holders are not exempted from this profoundly important premise when their power is economic, not just legal. *Ford Motor Co. v. United States*, 405 U.S. 562, 576 (1972); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 406 (1945). Monsanto has "real market power, not [a] mere[] . . . technical [patent] monopoly. . . ." *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1020 (7th Cir. 2002) (Posner, J.).

The Federal Circuit refuses to apply this premise, even in the face of the overwhelming evidence of Monsanto's market power presented in the record in this case. The jurisdictional powers granted the Federal Circuit, 28 U.S.C.A. § 1295, make it highly unlikely that these core premises will be examined elsewhere. Monsanto's pipeline of patents will keep it within the special and, with respect, skewed protections of the Federal Circuit.[1] This - in addition to the large costs of litigation - will keep thousands of farmers, in Mississippi and elsewhere, under of the thumb of Monsanto's

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[1] *See, e.g., Medimmune, Inc. v. Genetech, Inc.*, 127 S. Ct. 764 (2007); *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006); *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83 (1993). These are cases where the Federal Circuit adopted an impermissible pro-patent holder view of general jurisdictional and procedural rules. Here, the Federal Circuit has enforced an impermissible pro-patent holder view of the scope of the Sherman and Clayton Acts, 15 U.S.C.A. §§ 1, 2, 15(a).

oppressive market power, continuing to suffer antitrust injury.

## II. State Created Personal Property Rights Co-Exist With Intellectual Property Where No Patent Claims Seeds

The State of Mississippi also has an interest that rights of private property recognized under its laws be respected. The State strongly urges that certiorari be granted to consider Question No. 2:

> Whether and to what extent, if any, after creating a system in which biotech traits and seeds are separate products, and in which the farmer owns the unpatented seed products bought from a separate seed company, Monsanto, holding patents claiming only biotech trait products, may, consistent with valid and enforceable state law of personal property, interfere with the farmer's use and enjoyment of such unpatented seed products and their progeny, which under state law the farmer owns.

No patent in this case claim seeds. Monsanto proper does not sell seed, except through separately named subsidiaries. Farmers buy, pay for, and own the seeds they plant. Farmers own the seeds produced naturally by the plants that grow from the seeds farmers own and plant. Farmers own the progeny of the seeds they own and plant, the same as they own the progeny of their livestock.

Farmer saved seed is a valuable and traditional practice of good farmers in Mississippi, as elsewhere. With patents claiming only traits and not seeds, Monsanto has no legitimate right or interest in banning farmer saved seed, so long as Monsanto has a right to collect its legitimate patent royalty. The record shows a number of market stratagems that Monsanto has studied in this country and practiced in other countries which leave no doubt that Monsanto does not have to derogate

farmers' property rights in non-patented seeds in order to gain its full patent reward. The State has an interest that its law of personal property be enforced to protect the rights farmers justly hold in the unpatented seeds for which they have bought and paid.

In the interest of the cotton and soybean farmers of Mississippi,[2] and, of the people of Mississippi at large, the State respectfully suggests that this case presents highly certworthy "questions of federal law that ha[ve] not been, but should be, settled by this Court" within SUP. CT. R. 10(c).

## ARGUMENT IN SUPPORT OF REASONS FOR GRANTING THE WRIT

### I. Monsanto's Massive Market Power

Monsanto's herbicide tolerant Roundup Ready trait product in soybeans first hit farm supply stores in Mississippi in time for the 1996 crop year. Roundup Ready cotton, insect resistant Bollgard cotton and "stacked trait" cotton — cottonseeds with both the Roundup Ready trait and the Bollgard trait — followed in short order.[3] No one questions the utility of these biotechnology trait products. The State of Mississippi questions Monsanto's misuse of its patents and abuse of its massive market power in soybean and cotton trait and seed markets.

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[2] Many farmers in Mississippi and elsewhere are planting corn instead of cotton in 2007. *See, e.g.*, Andrew W. Martin, *Farmers Head to Fields to Plant Corn, Lots of It*, N.Y. Times, March 31, 2007, at B1, B8. Monsanto's Roundup Ready and YieldGard corn trait products are protected by the same patents as are involved in this case. Roundup Ready corn and YieldGard corn are subject to the Federal Circuit's expansive reading of Monsanto's patents, the same as Roundup Ready soybeans, Roundup Ready cotton and Bollgard cotton.

[3] It appears that Roundup Ready corn and/or YieldGard corn may now be coming to Mississippi in increasing quantities. See footnote 2 above.

### A. Roundup Ready Transgenic Traits

Monsanto began with U. S. Patent No. 5,352,605, issued in October 1994, C.A.App. 123-62[4], claiming the herbicide tolerant Roundup Ready trait. Roundup Ready, of course, connotes readiness to accept broad spectrum glyphosate-based Roundup branded herbicides, destroying competing vegetation but leaving the soybeans, cotton, or corn.[5] Roundup has long been Monsanto's "cash cow," before and since its glyphosate formulation patents expired in September 2000. Also, for the first three years that the Roundup Ready trait was on the market, Monsanto imposed an express and total tie requiring that, as a condition of using seed containing the patented Roundup Ready trait, the farmer had to buy Monsanto's Roundup herbicide.[6] Many multi-year 1998 grower license agreements, imposing this express tie, remained in effect through 2004 and the close of the record in the District Court.[7] See *Monsanto v. Bandy, et*

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[4] The abbreviation "C.A.App." refers to the Joint Appendix filed in the U. S. Court of Appeals for the Federal Circuit.

[5] Monsanto claims that the '605 patent protects its Roundup Ready trait product whether the specially created gene is inserted into soybeans, cotton, or corn seeds. C.A.App. 31425-431. Monsanto also claims that U. S. Patents Nos. 5,164,316, 5,196,525 and 5,196,938 ["the McPherson patents"]protect YieldGard corn and Bollgard cotton traits. *Id.*

[6] This total tie still binds Monsanto's Seed Partners, who produce and market Roundup Ready seeds, an important fact repeatedly raised by Petitioner Scruggs. C.A. App.267-272; 309-312.

[7] *Monsanto Co. v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004), *cert. den.*, 545 U.S. 1139 (2005) (*McFarling II*); and *Monsanto Co. v. Ralph*, 382 F.3d 1374 (Fed. Cir. 2004), are two of the many cases based on 1998 Monsanto Technology Agreements for alleged violations of those MTAs taking place in 1999, 2000 and subsequent years. The "consequences of the misuse of the patent have [not] been dissipated," *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 493 (1942), or "purged." *United States Gypsum Co. v. Nat'l Gypsum Co.*, 352 U.S. 457, 465 (1957). The reason this is so is that Monsanto's exercise of its market power muscle has left its Roundup Rewards "incentive" program an economic compulsion which continues the "tie." C.A.App. 20411-417. Again, the core problem is Monsanto's market power.

*al.*, No. 04cv00708ERW (E.D. Mo. filed 2004), Complaint, C.A. App. 31123-36, at ¶42.

Indeed, Monsanto's web of seed company acquisitions[8] and restrictive licence agreements with literally every other domestic seed company of consequence, continues to

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[8] The story of Monsanto's first wave of seed company acquisitions is well told in Daniel Charles, Lords Of The Harvest: Biotech, Big Money & The Future Of Food 147-204 (2001). Phase II includes the reacquisition of Emergent Genetics and the pending second attempt to acquire Delta & Pine Land Co., announced August 15, 2006. See "Monsanto Company to Acquire Delta and Pine Land Company for $1.5 Billion in Cash," http://monsanto.mediaroom.com/index.php?s=43&item=211&printable. Moreover, in the last two years alone, aside from the proposed acquisition of Delta Pine, Monsanto has acquired numerous seed companies either directly or indirectly through its subsidiary, American Seeds, Inc. "ASI." These acquisitions are worth nearly $2 billion, and include:

1. Siminis, a global leader in the seed industry with over 3500 varieties of seed sold in more 150 countries, in a deal worth $1.4 billion in cash and assumed debt. http://monsanto.mediaroom.com/index.php?s=43&item=91
2. Emergent Genetics (previously Stoneville Pedigreed Seed Co.) in a deal worth $300 million in cash and commercial paper. http://monsanto.mediaroom.com/index.php?s=43&item=332
3. Agricultural Assets of Icoria. http://monsanto.mediaroom.com/index.php?s=43&item=418
4. NC+ Hybrids. http://monsanto.mediaroom.com/index.php?s=43&item=319&printable
5. Core Group: http://monsanto.mediaroom.com/index.php?s=43&item=107&printable
   a. Fontanelle Hybrids
   b. Stewart Seeds
   c. Trelay Seeds
   d. Stone Seeds
6. Specialty Hybrids. http://monsanto.mediaroom.com/index.php?s=43&item=107&printable
7. Gold Country Seed. http://monsanto.mediaroom.com/index.php?s=43&item=57&printable
8. Heritage Seeds. http://monsanto.mediaroom.com/index.php?s=43&item=57&printable

increase its already significant market power.[9] Monsanto enforces downstream controls upon wholesale and retail farm supply stores.[10] These include a complex of high sales quotas and powerful "Action Pact" dealer incentive programs which have established and maintained great market power in the soybean and cotton trait and seed markets. This same stratagem has served to prop up Monsanto's market power in the glyphosate herbicide market post-patent expiration. Monsanto dealer farm supply stores cannot possibly meet their high sales quotas of Roundup branded herbicides if farmers have a viable option of buying much cheaper generic glyphosate based herbicides.

There is an unusual telltale feature of Monsanto's trait license agreements with its Seed Partners. Not only does it include highly restrictive quality control clauses, but Monsanto also pays the Seed Partner for its "seed services." In a normal competitive context, the inventor of a valuable new product exacts a royalty — his patent reward — from those licensed to distribute the patented product. In contrast, Monsanto pays the Seed Partner, and then imposes a series of downstream restrictions that directly benefit and enhance the profits of these seed companies. This shores up the seed cartel, most significantly by the elimination of competitive effects of the traditional secondary market in farmer saved seed.

The payment by Monsanto to its Seed Partners - and not vice versa -evidences Petitioner Scruggs charge that Monsanto "builds upon a patent monopoly 'for the exploitation or promotion of a business not embraced within the patent,' impermissibly extending the biotech trait patentee's control to downstream and separate seed

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[9] Monsanto Press Release, "Monsanto Vice President Emphasizes Importance Of Seed Partners To Monsanto's Success," June 11, 2003, found at www.monsanto.com/News&Media.

[10] These are presented in the record in this case through the Expert Witness Report of agricultural economist David W. Parvin of Mississippi State University. C.A.App. 13716-13860.

markets, as condemned in *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 459 (1940)." Petition For Certiorari, at page 12.

### B. Insect Resistant Bollgard Cotton Traits

All of this also occurs in the insect resistant cotton trait market, a market where Monsanto has never faced competition. The insect resistant trait is protected by the McPherson patents, C.A. App. 87-122. Cottonseed markets have proven much easier to control as there are only a dozen or so cotton seed companies that must be controlled.[11] Monsanto's control over these seed companies[12] continues to restrict the farmer's access to a non-Monsanto controlled seed company producing quality cotton seeds.

### C. Farmers Have No Practical Access To Competing Seed Products

Monsanto licenses its trait products directly to farmers. This trait distribution system is independent of the Monsanto controlled transgenic seed distribution system. The farmer still buys his seeds from the retail farm supply store or the farmers cooperative. His right to use the Roundup Ready or Bollgard trait products is solely a function of his direct trait license — sometimes a Monsanto Technology Stewardship Agreement — for which the farmer pays Monsanto an annual and ever increasing technology fee a/k/a patent royalty.

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[11] See, for example, the powerful statement by the Organization For Competitive Markets entitled "OCM Opposes Monsanto Acquisition of Delta & Pine," submitted to U. S. Department of Justice, Antitrust Division, on March 9, 2007, Appendix A here, also available at http://www.competitivemarkets.com/news_and_events/press_releases/2007/3-12Monsanto.htm. OCM's premises and reasoning justify a cert grant here.

[12] For example, Emergent f/k/a Stoneville has at all relevant times been within Monsanto's seed cartel by virtue of Monsanto's restrictive Seed Partner license agreement. C.A.App. 23063- 23102.

The farmer has all but lost access to competing products. Conventional seeds are disappearing ***and*** increasing in price. And if this were not bad enough, the chemicals necessary for effective cultivation of conventional soybeans and cotton crops becoming increasingly unavailable. C.A.App. 23640. As price takers for their inputs and outputs, the individual farmer are trapped on the technology treadmill.[13] This cost price squeeze leaves the farmer with no choice but to either use Monsanto's traits and complementary glyphosate herbicides, or go out of business.

**D. Monsanto's Massive Market Shares**

And so it is throughout the farm belt. The only difference in Mississippi, as compared with other states, is that Monsanto's market shares and market power are even greater than the market power levels readily seen elsewhere.

Since 1996 Monsanto has monopolized the herbicide tolerant soybean and cotton trait markets. By 2002, STS soybeans had only 6% of the herbicide tolerant soybean market. C.A.App. 23873-74. BXN herbicide tolerant cotton had about an 8% market share. C.A.App. 23875. The rest were Roundup Ready. By 2004, those competitve shares had dwindled, so that the market share for STS soybeans was a mere 3.1% of the herbicide tolerant soybean trait market and 2.3% of the total U. S. Soybean seed market. C.A.App. 16294. In 2004, Aventis' BXN cotton was down to 3.06% of all U. S. herbicide tolerant cotton acres and 2.0% of the total U. S. cotton seed market. C.A.App. 16294. There has never been a cotton seed on the market that provides a competitive

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[13] This pernicious economic phenomenon is fully explained in the record before the Federal Circuit by Dr. Lawrence Busch of Michigan State University, C.A.App.18072-18187; 18367-18597 and Dr. David W. Parvin of Mississippi State University. C.A.App.16394-16438, 16439-16587, 16588-16656.

threat to Bollgard or Bt cotton seed and its insect resistant trait.[14] Today market shares look like this:[15]

**Upland Cotton: Biotech Varieties by State and United States, % of Upland Cotton Planted, 2005-2006**

| | (Bt) | | | | Herbicide Resistant | | | |
|---|---|---|---|---|---|---|---|---|
| | 2003 | 2004 | 2005 | 2006 | 2003 | 2004 | 2005 | 2006 |
| MS | 15 | 16 | 14 | 7 | 16 | 23 | 23 | 22 |
| US | 14 | 16 | 18 | 18 | 32 | 30 | 27 | 26 |
| | | | | | | | | |
| | Stacked | | | | All | | | |
| | 2003 | 2004 | 2005 | 2006 | 2003 | 2004 | 2005 | 2006 |
| MS | 61 | 58 | 59 | 69 | 92 | 97 | 96 | 98 |
| US | 27 | 30 | 34 | 39 | 73 | 76 | 78 | 83 |

**Soybeans: Biotechnology Varieties by State and United States, % of all Soybeans Planted, 2005-2006**

| | Herbicide Resistant | | | | All | | | |
|---|---|---|---|---|---|---|---|---|
| | 2003 | 2004 | 2005 | 2006 | 2003 | 2004 | 2005 | 2006 |
| MS | 89 | 93 | 96 | 96 | 89 | 93 | 96 | 96 |
| US | 81 | 85 | 87 | 89 | 81 | 85 | 87 | 89 |

Source: United States Department of Agriculture, Agriculture Statistics Board, NASS Data.

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[14] Dow's Widestrike insect resistance trait has recently been introduced to the market, but has no more than a 1% market share. Center for Food Safety ("CFS") and International Center for Technology Assessment ("ICTA") Report: Cotton Concentration - An Assessment of Monsanto's Proposed Acquisition of Delta Pine & Land (2007) at p. 15.

[15] See also the market share statistics reported by the Organization for Competitive Markets, Appendix A noted above.

## II. Harms Directly Attributable To Monsanto's Market Power

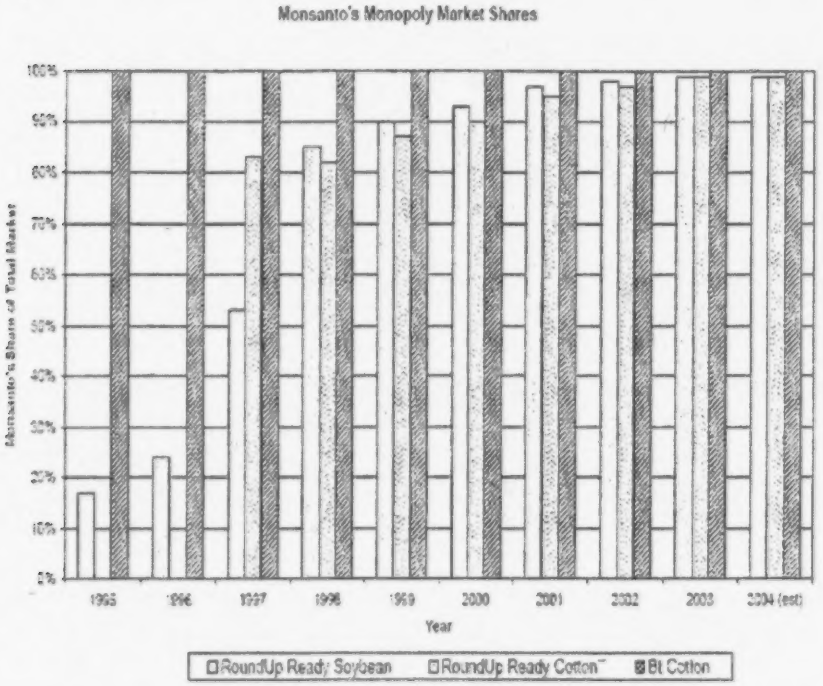
The harms suffered by Mississippi farmers are wide ranging. Many of these are directly attributable to Monsanto's market power as referenced in Question No. 4 of the Petition for Certiorari. Others are a function of the Federal Circuit's refusal to address legitimate personal property rights in the unpatented seed, as referenced in Question No. 2 of the Petition for Certiorari.

### A. Monsanto's Trait Price Increases

Price cannot be understood outside of the context of production costs. Once "invented," and once the trait is bred into seeds, reproduction is minute. Economists would express this as zero marginal costs after production and breeding. C.A.App. 23282-83. More ominous for Monsanto, if multiple trait suppliers are selling functionally similar traits to farmers, they will — in economic theory — compete the trait premium to zero. In this context, consider Monsanto's trait pricing.

- In 1999, Monsanto increased the price of its Roundup Ready soybean trait product 30% — from $5.00 per bag of soybeans to $6.50 per bag.
- In 2002, Monsanto increased the price of its Roundup Ready soybean trait product 19.2% — from $6.50 per bag of soybeans to $7.75 per bag.
- In 2005, Monsanto raised its U.S. Roundup Ready soybean royalty/tech fee to approximately $13.00 per 50 pound bag; and
- -In 2005, Monsanto raised its Roundup Ready cotton royalty/tech fee to approximately $34.67 per acre, lowered its Bollgard cotton royalty/tech fee to approximately $24.77 per acre, and raised its Bollgard/Roundup Ready cotton royalty/tech fee to approximately $59.28 per acre.

What is remarkable here, of course, is that with each price increase, Monsanto's market share's increased.[16] C.A.App. 30629, 30690. See charts above and below. C.A.App. 30239-41.




It is hard to know which hurts the farmer more; exponentially increasing trait prices, or the absence of viable competing traits. Monsanto is directly responsible for both harms.

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[16] This is also powerful evidence of Monsanto's market power within 35 U.S.C.A. § 271(d)(5). See 2A Philip A. Areeda & Herbert J. Hovenkamp, *Antitrust Law* ¶536, at 195-96 (2d ed. 2002) "A defendant firm has market power if it can raise price without a total loss of sales. Market power . . . is large when a firm can profit by raising prices substantially without losing too many sales." *Id.* ¶503a, at 93; see also William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981); Richard A. Posner & Frank H. Easterbrook, *Antitrust: Cases, Economic Notes & Other Materials*, 348-49 (2d ed. 1981); cf. U. S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, §1.11 (1992) (utilizing 5% price-increase test).

### B. Increased Conventional Seed Prices

Monsanto's intervention in seed markets has caused statistically significant increases in conventional soybean and cotton seed prices.[17] C.A.App. 13780, 13868-85, 15965-74, 21443. Dr. Robert D. Tollison, a nationally recognized antitrust economist, ***predicted*** that conventional seed prices would rise due to Monsanto's policies and cartel formation. C.A.App. 21535-40. Subsequent evidence confirms Dr. Tollison's prediction. C.A.App. 21442-43. Dr. Ian Ayres of Yale has shown this amazing increase in ***conventional*** seed prices, particularly in 2001 and 2002, even though Monsanto's technology has rendered non-biotech seed more obsolete than cassette tapes. Conventional soybean seed prices have risen by more than $2 a bag and conventional cottonseed prices over $9 a bag. C.A.App. 21442-43. 2003 saw another seven percent incremental increase in the price of conventional cotton seeds. C.A.App. 16668. At the same time, demand for conventional seed has continued to drop precipitously since 1996. C.A.App. 21549. Dr. Tollison confirms this interpretation. C.A.App. 27276-313. Dr. David Parvin, an agricultural economist at Mississippi State University, explains that this increase in conventional seed prices holds in Mississippi and has damaged Mississippi farmers, like Scruggs. C.A.App. 16596-615, 16667-69.

The problem here is exacerbated by the disappearance from the market of the chemicals necessary to use conventional seeds. C.A.App.20418-22, 21047-48, 23640.

### C. Cross-Licensing Enhances Monsanto's Seed Cartel

Each appearance of a would be competitor in the transgenic trait and seed markets has been quickly

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[17] Scruggs' antitrust economist experts Ayres, C.A.App. 4390, Tollison, C.A.App. 4771, 13934, predicted this effect ***before*** Monsanto's agricultural economist showed that it had happened. C.A.App.13499-500.

followed by Monsanto's successful negotiation of a cross-licensing agreement. Monsanto's makes cross-licensing agreements involving *these same patents* and the trait products they ostensibly protect, *viz.*

i. The October 14, 2003, Monsanto - Bayer CropScience AG broad-reaching business settlement and cross-licensing agreement,

ii. The October 2, 2002, Monsanto - Dow Agrosciences broad reaching business settlement and cross-licensing agreement, and

iii. The April 2, 2002, Monsanto - DuPont/Pioneer broad reaching business settlement and cross-licensing agreements.

It is widely known that such "licensing policies may serve as a mask for collusive conduct on the part of competing licensees. In such cases, important antitrust policies may be threatened." *Mannington Mills, Inc. v. Congoleum Indus., Inc.*, 610 F.2d 1059, 1071 (3rd Cir. 1979). What Monsanto has done of late is exemplary of what Judge Richard A. Posner warned against; that cross-licensing agreements, such as these, may often "disguise a cartel as a lawful patent monopoly." William M. Landes & Richard A. Posner, *The Economic Structure Of Intellectual Property Law* 383 (2003). This too is an important controlling question addressed under Question No. 4 of the Petition For Writ Of Certiorati.

**D. Monsanto Forces Economic Waste**

Each year, Monsanto misuses its market power and its patents to force farmers to destroy valuable germplasm owned and produced by farmers. Cotton and soybean plants naturally produce new seeds which, when properly prepared and planted, yield high quality crops.

Without intellectual or personal property rights in farmer saved germplasm, Monsanto requires that it be fed to livestock, destroyed, or sold to the oil mill for a

fraction of its value. This is unjustifiable economic waste, C.A.App. 16402, 17144, that shores up Monsanto's seed cartel. This "destruction of a tremendous amount of seeds each year . . . facilitates a reduction in the supply and an increase in the price of seeds (both transgenic **and** conventional)." C.A.App. 21547. Robert B. Ekelund & Robert D. Tollison, *Economics* G3, 284 (4th ed. 1994). These saved seeds have substantial economic utility. Because it "constrains the price of new seed," C.A.App. 16486, forced destruction of these saved seed has a substantial anticompetitive effect.

The problem of economic waste is at the heart of Question No. 2 in the Petition for Certiorari. This antitrust injury being suffered by Mississippi's farming community could be remedied in part should the Court grant certiorari and articulate the proper line of demarcation between patent rights and state created property rights. Moreover, this Court should endorse the holding of the District of Columbia Circuit that trait and seed are separate products, though physically and technologically integrated with the tying product. *United States v. Microsoft Corp.*, 253 F.3d 34, 89, 90 (D.C.Cir. 2001).[18]

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[18] To be sure, Judge Raymond C. Clevenger, III once recognized that "[whether there are] two distinct products for tying purposes is a question of fact usually determined by examining consumer demand." *McFarling II*, 363 F.3d at 1343. This is not the only time Judge Clevenger showed he understood. *See, e.g., McFarling I*, 302 F.3d 1291, 1300-07 (dissenting opinion), where Judge Clevenger articulately unmasked Monsanto's misuse of its market power to impose forum selection clauses forcing farmers from Mississippi and elsewhere to litigate in St. Louis only. But Judge Clevenger has taken senior status. By reference to the reported opinions, only one Circuit Judge in active service on the Federal Circuit has filed an opinion recognizing any of the practical realities of the farmer's plight in the era of genetically modified seed. *See Smithkline Beecham v. Apotex*, 365 F.3d 1306, 1330-31 (Fed. Cir. 2004) (Gajarsa, J., concurring).

### E. Monsanto Has Put Legitimate Seed Cleaners Out Of Business

Late Twentieth Century seed saving farmers always had access to seed cleaners. Every county in Mississippi and throughout the soybean belt had bin run bean cleaners. Monsanto served notice on these legitimate businesses that, if they cleaned soybeans containing Monsanto's Roundup Ready trait, they were guilty of patent infringement. But if the farmer owns the seed and the seed is a separate product from the patented Roundup Ready trait, Monsanto is altogether wrong.

The true irony here is Monsanto's practice with its intellectual property protected seed varieties marketed in the United Kingdom. In the U. K., Monsanto has decided to partner with the seed cleaners, and relies on seed cleaners for royalty collection, record keeping and the like. Monsanto is a member of the British Society of Plant Breeders and since 1996 has participated in the BSPB system that allows farmers to pay annual royalties on saved seed. C.A.App. 28504, 13406-13541. See http://www.naac.co.uk/sections/MSCbenefits.htm. See CYO Mobile Seed Cleaning Services, http://www.cyoseeds.com/Seeds/seeds.htm for a description of the services of a mobile seed cleaning service in the UK.

Monsanto's ruination of legitimate bin run soybean cleaners is an important facet of the Question No. 2 in the Petition for Certiorari.

### F. The Competitive Potential Of The Saved Seed Market

Understanding the potential size and competitive effect of the saved seed market is important. This is because the Roundup Ready traits in cotton seed and soybeans and for the Bt traits in cotton seed have

virtually no other competition.[19] A 1995 study estimated that 20% of soybean seed is "bin run." C.A.App. 24122. A second 1995 study, a survey of growers, found that 23% of Midwest growers and 28% of Southern growers saved seed.

In the District Court, Dr. Lawrence Busch presented data for all saved seed. Table 2.1 below shows a considerable decline in soybean seed saving from 1996 to 2000. Furthermore, one study estimated that 60-70% of soybean seed was saved in the south, while 20-30% was saved in the Midwest. C.A.App. 16320. Dr. Busch summarized the decline of farmer saved soybeans since Monsanto entered the market.

**Table 2.1 Percent of Soybean Acreage Planted to Saved Seed, 1996-2000**

| | Acres (%) | Units (%) |
|---|---|---|
| **1996** | 22.5% | 22.5% |
| **1997** | 21.1% | 22.6% |
| **1998** | 17.2% | 18.2% |
| **1999** | 13.5% | 15.1% |
| **2000** | 16.1% | 18.4% |

*Source: US Farm Soybean Seed Study*, Doane Marketing Research.

Dr. Busch has produced a similar table showing the decline in saved cotton acreage planted with saved cotton seed.

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[19] The newly introduced Widestrike insect resistant trait in cotton has at most a 1% market share. See footnote 14 above. BXN cotton has only about an 8% share of the herbicide tolerant cotton trait market, C.A. App. 23875. Roundup Ready cotton has the rest. STS soybeans have only about a 6% share of the herbicide tolerant soybean trait market. C.A.App. 23873-74. Roundup Ready soybeans have the rest.

| Table 2.2 Percent of Cotton Acreage Planted to Saved Seed, 1995-2000 | |
|---|---|
| 1995 | 27% |
| 1996 | 25% |
| 1997 | 24% |
| 1998 | 24% |
| 1999 | 21% |
| 2000 (est.) | 19% |
| Source: Context Consulting, *Biotech Traits Commercialized.* | |

In spite of these declines, there can be no doubt that a large number of farmers desire to save transgenic cotton seeds while still paying royalties to Monsanto for the use of its patented traits.

Time is of the essence of the legal imperative that Monsanto's ban on saved seed be ended. Soybean growers questioned in January of 2002 "had little to moderate knowledge of the cost of saved seed" and "were concerned whether there were enough seed cleaning/conditioning facilities available to meet the demand." C.A.App. 19752. Monsanto's draconian enforcement of its no saved seed policy since 1996 has clearly taken its toll. This misuse of Monsanto's patents continues to harm competition and consumers.

## III. Certiorari Should Be Granted In *This* Case

There is a far more important reason why the Court should grant certiorari ***in this case.*** Monsanto has been suing farmers here and elsewhere for a decade. CFS, *Monsanto vs. U. S. Farmers*, (2005), available at http://www.centerforfoodsafety.org/Monsantovsussfarmersreport.cfm.[20] These are David and Goliath cases. Only Homan McFarling, also of Northeast Mississippi, has made it as far as Mitchell Scruggs and his family

[20]CFS recently updated the information in its original report with a supplemental report issued on May 23, 2006, attached as Appendix "B."

businesses. *See Monsanto Co. v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002), *cert. den.*, 537 U.S. 1232 (2002) (*McFarling I*), and *Monsanto Co. v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004), *cert. den.*, 545 U.S. 1139 (2005) (*McFarling II*). McFarling's inability to assemble a team of qualified antitrust and agricultural experts ***and*** produce findings and reports of the quality and depth of those presented in this case was no doubt in substantial part responsible for his setbacks.

Suffice it to say that the barriers to entry separating seed saving farmers from access to this Court are huge. It is fitting and proper that the State of Mississippi, acting through its Attorney General, step forward on the side of David to urge the Court to grant certiorari in the public interest.

## CONCLUSION

The Petition For A Writ Of Certiorari should be granted.

Respectfully submitted, this 5th day of April, 2007.

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# APPENDIX A

**CENTER FOR FOOD SAFETY**

## Monsanto vs. U.S. Farmers

### *2005 Updated Statistics*

Over a year has passed since the release of *Monsanto vs. U.S. Farmers*. In the course of the report, we documented Monsanto's unprecedented use of patents and restrictive license agreements to sue farmers for suspected seed-saving. Monsanto continues its aggressive and systematic action in the name of protecting its patents on genetically engineered (GE) seed, routinely extracting tens of thousands of dollars from American farmers. Below we provide updated estimates, as of the end of 2005, on the number and nature of these lawsuits.[1]

1. Number of Lawsuits Filed Against U.S. Farmers
    - At the end of 2005, Monsanto had filed 94 lawsuits based on purported violations of its technology agreement and its patents on genetically engineered seed.
    - These cases have involved 351 farmers and 47 small businesses/farm companies.[2]
2. Number of Active Lawsuits
    - At the end of 2005, 15 of the 94 cases filed by Monsanto against farmers were ongoing.

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[1] Unless otherwise noted, information here was compiled by CFS using public court records. These records were accessed using the PACER system, available at - http://pacer.uspci.uscourts.gov. All the information here is catalogued up to December 31, 2005.

[2] The number of farmers sued by Monsanto has more than doubled in the past year. This is mainly due to a new case in Texas, in which 196 farmers and 5 businesses are named as defendants. See #6 in the text for more details.

3. Lawsuits Filed by Geographic Location
    - At the end of 2005, Monsanto had sued farmers and small farm companies residing in 27 different states.
4. Recorded Judgments
    - At the end of 2005, the total recorded judgments granted to Monsanto for farmer lawsuits amounted to $16,849,255.07.[3]
    - Of the recorded judgments:
        - The largest was $3,052,800.00.
        - The smallest was $5,595.00.
        - The mean was $391,843.14.
        - The median was $112,500.00.
5. Lack of Adequate Legal Representation
    - Seven defendants did not have attorneys of record listed and three are on record as representing themselves.
6. New Cases in 2005
    - Monsanto opened 7 new cases against farmers and small farm companies in 2005.
    - One of the new cases, *Monsanto v. Raesz*, was filed against 196 cotton farmers and 5 farm companies in Texas. First the farmers sued Monsanto; they claim to have suffered serious crop losses as a result of a defect in Monsanto's GE cotton. In response, Monsanto attempted to

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[3] This total does not include $14,429,380.59 awarded to Monsanto in *Monsanto v. Hill Seed Company*. This case was excluded from the calculations because, though related to patent infringement, it revolves around a seed company contract, and is a slightly different kind of case.

use its technology agreement to force arbitration. This matter has yet to be resolved.[4]

Early in 2006, Monsanto shows no signs of slowing down. In the first four months of this year, the company has filed 6 new cases against farmers and small seed companies, bringing the total number of such cases to 100.

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*Compiled May 23, 2006*

[4] The information in the public record for *Monsanto v. Raesz* is limited. For more information on this case, see these news articles: Carey Gilliam, "Cotton farmers sue Monsanto, others, for crops loss," Reuters, February 24, 2006. Rachel Melcer, "Monsanto seeks binding arbitration," St. Louis Post-Dispatch, February 28, 2006.

# APPENDIX B

**CENTER FOR FOOD SAFETY**

## Lawsuits Filed Against U.S. Farmers and Small Farm Companies by Monsanto

### New cases since December 31, 2005 (compiled May 23, 2006)

Shaded cases are ongoing. All information here was derived from court documents in the public record (PACER: http://pacer.uspci.uscourts.gov).

| | Date Filed | Case Number | District | Farm Location | PACER-Type | Status/Outcome | Payment to Monsanto |
|---|---|---|---|---|---|---|---|
| American Seed Company, Inc. | 4/7/2005 | 05-CV-00554 | Eastern District of Missouri | PA | 830 | Ongoing. American Seed was licensed to sell Monsanto's GE seed to farmers. Monsanto claims that American Seed failed to report sales to | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | Monsanto and therefore breached their licensing agreement, and also argues that such a breach would entail patent infringement for the continued sale of Monsanto seed. 10/14/05 - Order referring case to alternative dispute resolution, but no settlement was reached (2/1/06). | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Raesz, Arnold; +195 farmers and 5 businesses | 9/6/2005 | 05-cv-711 | Western District of Texas (Austin) | TX | 190 | Ongoing. Little information available in the public record. | |
| Keefe, J.W. | 9/30/2005 | 4:05-cv-02828 | District of South Carolina (Florence) | SC | 830 | Ongoing. Monsanto alleges that Keefe planted Carolina saved Roundup Ready® soybeans. | |
| Pacha, Eugene and Pat | 10/7/2005 | 4:05-cv-00553 | Southern District of Iowa | IA | 830 | Case closed with judgement in favor of Monsanto (3/24/2006) | $30,900 |
| Lee, Terry; Barry Lee, | 10/28/2005 | 4:05-cv-00597 | Southern District of | IA | 830 | Ongoing. Monsanto alleges | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Harold Lee, Lee & Sons Farm | | | Iowa | | | that the Lee saved and re-planted Roundup Ready® soybeans. Trial deadline set for 1/8/07 | |
| Strickland, William | 10/28/2005 | 4:05-cv-03062 | District of South Carolina (Florence) | SC | 830 | Ongoing. Monsanto alleges that Strickland planted saved Roundup Ready® soybeans. | |
| Dragan, Peter | 11/2/2005 | 1:05-cv-00786 | Western District of New York (Buffalo) | NY | 830 | Ongoing. Monsanto alleges Dragan saved, planted, offered to sell, and sold Roundup Ready soybean seed in | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | and prior to 2005. Dragon admitted to planting saved seed in 2005 but denies having planted it prior to 2005 as well as all other allegations. Jury Trial set for 4/10/06. | |
| Kueckelhan, Raymond | 1/20/2006 | 4:06-cv-00099 | Eastern District of Missouri | MO | 830 | Ongoing. Little information available in the public record. | |
| Ryan, John; John Ryan and Sons | 1/20/2006 | 4:06-cv-00100 | Eastern District of Missouri | MI | 830 | Ongoing. Ryan denies that he planted saved seed. He admits that he once in | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | 2005 "made available soybeans to a third party dairy farmer whom he believed would use the soybeans as animal feed. Defendant has not sought or received any payment for those soybeans." | |
| Vanderhoof, Floyd Edward, Jr. | 1/30/2006 | 4:06-cv-00134 | Eastern District of Missouri | MI | 830 | Ongoing. Vanderhoof denies that he planted saved seed. | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Henderson, William Robert, Jr. | 2/2/2006 | 4:06-cv-00155 | Eastern District of Missouri | TX | 830 | Ongoing. Complaint has been made, but with little development. | |
| Oswald, Pat | 2/2/2006 | 4:06-cv-00154 | Eastern District of Missouri | MO | 830 | Ongoing. Little information available in the public record. | |
| Taylor, James | 3/15/2006 | 2:06-cv-00013 | Eastern District of Missouri | MO | 830 | Ongoing. Little information available in the public record. | |